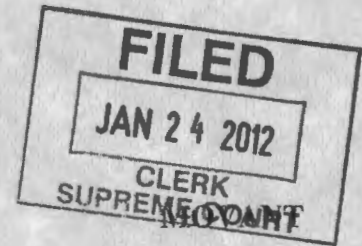


SUPREME COURT OF KENTUCKY
CASE NO. 2011-SC-000157-CL



COMMONWEALTH OF KENTUCKY

VS.

Certification of Law from Jefferson District Court
Division 304
Honorable Sheila Collins, Judge
Case No. 11-M-004285

MICHAEL L. WILSON

RESPONDENT

BRIEF *AMICUS CURIAE*
OF THE KENTUCKY ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF RESPONDENT

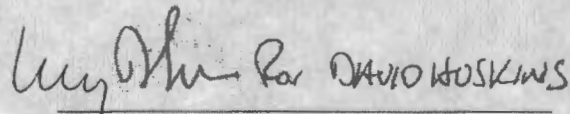
Respectfully submitted,



KENTUCKY ASSOCIATION OF
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this 5th day of January, 2012, mailed to David A. Sexton, Special Assistant Attorney General, Assistant Jefferson County Attorney, 531 Court Place, Suite 900, Louisville, KY 40202; Paul Gold, 200 South Seventh Street, Suite 320, Louisville, KY 40202; Honorable Sheila Collins, Judge, Jefferson District Court, 600 West Jefferson Street, Louisville, KY 40202; Honorable Erica Lee Williams, Judge, Jefferson District Court, 600 West Jefferson Street, Louisville, KY 40202; Michael J. O'Connell, Jefferson County Attorney, 531 Court Place, Suite 900, Louisville, KY 40202; and Honorable Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601.



DAVID HOSKINS

INTRODUCTION

Kentucky law explicitly authorizes defendants to request *ex parte* relief in the form of bond reduction or its functional equivalent, conversion of an arrest warrant to a summons to appear before the appropriate Court on a date and time certain. SCR 4.300, Canon 3B.7(a)(i) and (ii), and RCr 4.04. The Court has discretion either to grant the request and order the defendant to appear before the Court, or to deny the request. If the request is granted, the Commonwealth has notice and an opportunity to be heard when the defendant surrenders himself to the Court's jurisdiction in accordance with the Court's *ex parte* order. If the request is not granted, the Commonwealth will be heard when the defendant is arrested and arraigned.

ARGUMENT

KENTUCKY LAW AUTHORIZES DEFENDANTS TO REQUEST *EX PARTE* RELIEF SUBJECT TO THE REQUIREMENTS OF THE JUDICIAL CODE OF CONDUCT AND RCR 4.04.

A. RCr 4.40 does not prohibit defendants from requesting *ex parte* relief.

RCr 4.40 governs "(r)evuew of conditions of release," and states in pertinent part:

The defendant or the Commonwealth may by written motion apply for a change of conditions of release at any time before the defendant's trial. The motion shall state the grounds on which the change is sought. The moving party **may** request an adversary hearing on the motion, and is entitled to such hearing the first time the moving party requests it. Requests for adversary hearings made in subsequent motions for review of conditions of release shall lie within the discretion of the court.

RCr 4.40(1). There is nothing in this rule which contradicts the practice outlined above.

Moreover, the rule appears to contemplate release after the defendant has already appeared before the Court. The scant case law interpreting RCr 4.40 does not address the issue of pre-arraignment motions. *See, e.g., Sydnor v. Commonwealth*, Ky. App., 617 S.W.2d 58 (1981); *Brown v. Commonwealth*, Ky., 789 S.W.2d 748 (1990).

Typically, in Jefferson District Court, requests to set aside a warrant or convert to a summons, similarly to bond reduction motions after arraignment, are accomplished by the attorney filling out a written form, JEFF-056-132. *See, e.g.,* Movant's Brief, Appendix, at 4. This form specifies the date, time, and division when the case is to be redocketed; whether a judge's permission is needed to redocket the case; and whether an arrest warrant or bench warrant has been set aside. *Id.* If the attorney seeks to have a warrant set aside in favor of a summons, the attorney must seek a judge's permission. The judge may either grant or deny the request. If the judge grants the request, the judge directs the attorney and the clerk of the court, by writing on the form, when and where the defendant is to appear in court. The defendant's last name determines the alphabetical assignment of the case to the appropriate division of the Jefferson District Court. The Court can impose nonfinancial conditions on a defendant's release from custody, to ensure the protection of the alleged victim, witnesses, and the public, even before the summons is served. *See* RCr 4.04, *infra*. That is precisely what the Court did in this case. *See, e.g.,* Movant's Brief, Appendix, at 4.

B. KRS 431.064(2) does not prohibit defendants from requesting *ex parte* relief.

KRS 431.064(2) deals with pretrial release of persons arrested for assault, sexual offense, or violations of a protective order, and provides:

Before releasing a person arrested for or charged with a crime specified in subsection (1) of this section, the court shall make findings, on the record if possible, concerning the determination made in accordance with subsection (1) of this section, and may impose conditions of release or bail on the person to protect the alleged victim of domestic violence or abuse and to ensure the appearance of the person at a subsequent court proceeding.

Again, there are no cases interpreting this portion of the statute. However, the statute demonstrates that even in domestic violence cases, defendants "arrested for or **charged with a crime**" may nonetheless be released pursuant to conditions of release (emphasis added). *Id.* The

statute authorizes the imposition of such conditions specifically to protect witnesses and to ensure the defendant's appearance. *Id.* Clearly, the plain language of the statute contemplates that a defendant's conditions of release may be imposed while the defendant is not in custody. Again, there is nothing in this statute incompatible with the actions taken by the Court in this case.

C. Canon 3B(7)(a) authorizes defendants to request *ex parte* relief under these circumstances.

SCR 4.300, Canon 3B(7), states:

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. With regard to a pending or impending proceeding, a judge shall not initiate, permit, or consider *ex parte* communications with attorneys and shall not initiate, encourage or consider *ex parte* communications with parties, except that:

- (a) Where circumstances require, *ex parte* communications for scheduling, initial fixing of bail, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
 - (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and
 - (ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.

Here, a state-by-state survey of cases arising under Canon 3B(7) reveals only one published case dealing with the issue of defense counsel (or others) contacting judges regarding setting aside warrants or reducing bail. *Matter of Mosley*, Nev., 102 P.2d 555, 120 Nev. 908 (2004) (judge cleared of violation of Canon 3B(7)).

The practice of defense counsel contacting a judge to request that he be allowed to bring a defendant to Court at a date and time certain for arraignment--rather than the client's being

arrested, booked, bail set, and a court date set--does not require a judge to make any decision as to the merits of the case. The judge, further, has discretion to deny the request.

Moreover, RCr 4.04 provides an array of options the judge may consider in granting bail or release pending arraignment: "(a) personal recognizance; (b) unsecured bail bond; (c) nonfinancial conditions; and (d) executed bail bond," either via surety, cash, property, or an arrest bond. RCr 4.04(1).

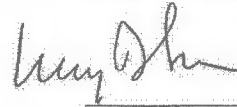
Finally, **if** the judge grants the request, the case will be heard at a date and time certain, generally the next day the Court is in session. The Commonwealth has notice and an opportunity to be heard when the defendant surrenders himself for arraignment in accordance with the Court's *ex parte* order.

If the request is not granted, the Commonwealth will be heard when the defendant is arrested and arraigned.

CONCLUSION

Your amicus respectfully requests that this Court answer the question of law presented herein as follows: Kentucky Courts retain discretion to consider setting aside arrest warrants pursuant to the exceptions contained in SCR 4.300, Canon 3B7(a)(i) and (ii), and permitting defendants to appear for arraignment, giving the Commonwealth notice and opportunity to be heard, at a date and time certain pursuant to such conditions as the respective Court may impose pursuant to KRS 431.064(2) and RCr 4.04(1).

Respectfully submitted,

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